(5)

No. 96-910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONERS

PATRICIA T. BERGESON
Acting Corporation Counsel of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
ANNE BERLEMAN KEARNEY
Assistant Corporation Counsel
City Hall, Room 610
Chicago, Illinois 60602
(312) 744-5337
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60 pp

QUESTION PRESENTED

Whether a lawsuit containing claims that a local administrative agency's decision violates federal law, but also containing state-law claims that are not reviewed de novo, is a civil action within the original jurisdiction of the federal district courts.

PARTIES TO THE PROCEEDING

Petitioners are the City of Chicago, the Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Friedman, Seymour Persky, Larry Parkman, Christopher R. Hill, and Cherryl Thomas.* Respondents are the International College of Surgeons, the United States Section of the International College of Surgeons, Robin Construction Corporation, 1500 Lake Shore Drive Building Corporation, and the North State, Astor, Lake Shore Drive Association.

---

* One petitioner—Christopher R. Hill—was not named as a petitioner in the petition for certiorari, but has since succeeded petitioner Joseph F. Boyle, Jr., in office and accordingly is automatically substituted as a petitioner by virtue of this Court's Rule 35.3.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-910

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

The City of Chicago, its Commission on Chicago Historical and Architectural Landmarks, Peter C.B. Bynoe, Joseph A. Gonzales, John W. Baird, Kein L. Burton, Marian Despres, Albert M. Friedman, Seymour Persky, Larry Parkman, Christopher R. Hill, and Cherryl Thomas (collectively "the City") submit this brief as petitioners.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 91 F.3d 981 (7th Cir. 1996). The opinions of the district court (Pet. App. 26a-96a; J.A. 129-41) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. A timely petition for rehearing was denied on November 4, 1996. Petitioners' petition for writ of certiorari was filed on December 4, 1996. This

Court granted the petition on April 14, 1997. The Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

STATUTES INVOLVED

Three statutory grants of jurisdiction to the federal courts are relevant here. The federal question statute, 28 U.S.C. § 1331, provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

The supplemental jurisdiction statute, 28 U.S.C. § 1367, provides in pertinent part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

[1] Under 28 U.S.C. § 1447(d), orders of a district court remanding a case to the state court from which it was removed for lack of federal jurisdiction are not subject to any form of appellate review. *E.g., Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494, 497-98 (1995). In this case, the district court did not remand the consolidated cases before it to state court but instead entered a final judgment on the merits. See Pet. App. 90a-91a. Accordingly, this case was properly "in" the court of appeals within the meaning of Section 1254(1) as an appeal from a final judgment under 28 U.S.C. § 1291. This Court, in turn, has consistently exercised jurisdiction under Section 1254(1) over cases in which the district court did not order a remand and the court of appeals held that it should have. See, *e.g., Mesa v. California*, 489 U.S. 121 (1989); *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972).

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

The removal statute, 28 U.S.C. § 1441, provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .
>
> (c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates. . . .

STATEMENT

The International College of Surgeons and the United States Section of the International College of Surgeons (collectively "ICS"), respondents in this Court, own two parcels of land on North Lake Shore Drive in the City of Chicago. Pet. App. 2a. One parcel is located at 1516

North Lake Shore Drive and is improved with a four-story mansion, called the Edward T. Blair House to reflect its historical significance. Pet. App. 2a. The other parcel is located at 1524 North Lake Shore Drive and is improved with a three-story mansion of historical significance, the Eleanor Robinson Countiss House. *Ibid.* In July 1988, the Commission on Chicago Historical and Architectural Landmarks (the "Landmarks Commission"), an agency of the City of Chicago created by the Chicago Landmarks Ordinance, made a preliminary determination that a district comprising seven buildings in that area, including the properties at issue, satisfied the criteria for designation as a landmark district under the Landmarks Ordinance. Pet. App. 3a.[2] In June 1989, the Chicago City Council followed this recommendation and enacted an ordinance creating the landmark district. *Ibid.*[3]

In February 1989, after the Landmarks Commission's preliminary determination, but before the City Council had acted, ICS signed a contract for the sale and redevelopment of the property. Pet. App. 3a. The contract called for the demolition of all but the facades of the two

[2] Under the ordinance, the Commission is empowered to make a preliminary determination that an area should be designated as a landmark. J.A. 163. After a public hearing, the Commission makes its final determination whether to recommend that the area should be designated. *Id.* at 165-67. The Chicago City Council then acts on the Commission's recommendation. *Id.* at 167-68. Once an area has received a preliminary landmark determination from the Landmarks Commission or a final determination from the City Council, no permit for any alteration, construction, demolition, relocation, or other work in the landmarked area may issue without the approval of the Commission. *Id.* at 169-70.

[3] The State of Illinois has granted authority to its municipalities to enact ordinances providing for the creation of landmark districts. See 65 ILCS para. 5/11-48.2-2. The City of Chicago also has authority to enact and enforce its Landmarks Ordinance under the home-rule power granted by the Illinois Constitution. See *Landmarks Preservation Council v. City of Chicago*, 125 Ill. 2d 164, 178-81, 531 N.E.2d 9, 15-16 (1988).

mansions and, behind the facades, the construction of a forty-one story, high-rise building. Pet. App. 3a. The sale was contingent on ICS's ability to obtain all necessary permits and approvals. *Ibid.* Respondent Robin Construction Corp. acquired the developer's interest in late 1989. *Ibid.* ICS applied for demolition permits in late 1990, and after a public hearing, the Landmarks Commission disapproved the demolition permits in January 1991. Pet. App. 3a; J.A. 20, 148.[4]

In February 1991, ICS filed suit in the Circuit Court of Cook County, Illinois, seeking judicial review of the Landmarks Commission's decision. Pet. App. 3a; J.A. 17-56.[5] The complaint alleged both state and federal claims, including claims that the Landmarks Commission's decision denied ICS its due process rights under the Fifth and Fourteenth Amendments, violated its right to equal protection under the Fourteenth Amendment, and constituted an uncompensated taking of property in violation of the Fifth and Fourteenth Amendments. J.A. 24-33. The complaint also alleged that the Landmarks Ordinance itself was facially unconstitutional under the Due Process and Equal Protection Clauses. *Id.* at 22-24. The City removed the case to the United States District Court for the Northern District of Illinois, where it was docketed as case number 91 C 1587. *Id.* at 11-16. In August 1991, the district court denied ICS's motion to remand the case to state court, concluding that ICS's complaint raised federal constitutional questions cognizable under 28 U.S.C. § 1331 and accordingly was within the scope of federal removal jurisdiction under 28 U.S.C. § 1441. Pet. App. 94a-96a.

Also in February 1991, ICS filed an application with the Landmarks Commission seeking demolition permits

[4] The procedures in the Landmarks Ordinance governing permit applications are found at J.A. 169-74.

[5] Under Illinois law, decisions of a municipal landmarks commission are "subject to judicial review pursuant to the provisions of the Administrative Review Law . . . ." 65 ILCS para. 5/11-48.2-4.

on grounds of economic hardship. Pet. App. 4a; J.A. 72.[6] Following public hearings, the Landmarks Commission denied this request. Pet. App. 4a; J.A. 73. ICS then filed a second action in state court seeking judicial review, again alleging the same federal constitutional violations as in its first complaint, along with certain state-law claims. J.A. 73-79. The City removed this action as well to the district court, where it was docketed as case number 91 C 5564. *Id.* at 57-64.[7]

After ICS's two district court actions were consolidated, the City moved to dismiss the complaints. J.A. 129. The district court granted the motions in part, dismissing some of ICS's federal-law claims with prejudice and some without prejudice, and denied the motions in part. *Id.* at 129-41.

In February 1992, ICS filed an amended consolidated complaint in federal court. J.A. 142. The complaint alleged that the court had jurisdiction over the consolidated actions because they fell within the district court's federal-question jurisdiction under 28 U.S.C. § 1331. *Id.*

---

[6] This procedure was permissible under the Landmarks Ordinance which provides that if a permit application has been disapproved, the applicant may then seek an economic hardship exception. J.A. 174-77.

[7] ICS also submitted an application for approval of its redevelopment plan by the Chicago Plan Commission, as required under Chicago's Lakefront Protection Ordinance, but after a public hearing, the Plan Commission denied the application. Pet. App. 4a, 92a. ICS then sought an amendment to the Chicago Zoning Ordinance permitting the proposed development, but the Chicago City Council refused to approve the amendment. *Id.* at 4a. ICS filed a third suit, this time in federal district court (case number 91 C 7849), seeking review of these determinations under both federal and state law. *Ibid.* The district court stayed this third action pending its disposition of the two actions that had been removed from state court (*ibid.*) and later dismissed the case as moot (*id.* at 92a-93a). This third action is not at issue here.

at 143. The complaint included federal due process, equal protection, takings, and state-law claims. *Id.* at 149-56.

In December 1994, the district court granted summary judgment for the City. Pet. App. 89a. That court held that the Landmarks Ordinance was constitutional under both the United States and Illinois Constitutions and that the Landmarks Commission's decisions denying ICS's demolition permit and economic hardship applications were lawful under both Constitutions and under the Ordinance itself. *Ibid.* ICS appealed.

The court of appeals reversed and ordered the case remanded to the district court with instructions to remand it to state court. Pet. App. 2a. The court of appeals began by observing that removal jurisdiction exists over any "'civil action brought in a State court of which the district courts of the United States have original jurisdiction.'" *Id.* at 6a-7a (quoting 28 U.S.C. § 1441(a)). The inquiry under Section 1441(a) accordingly depends on whether "the action originally could have been brought in the district court." *Id.* at 7a. In this case, the district court had ruled that ICS's complaints were within federal-question jurisdiction under 28 U.S.C. § 1331 because they alleged that the Landmarks Ordinance was contrary to the United States Constitution and that the Landmarks Commission's decisions violated the United States Constitution. *Id.* at 20a. And the court of appeals agreed that the complaints "filed in the Circuit Court of Cook County and removed to the district court contain facial attacks [under the United States Constitution and] allegations of unfairness of a federal constitutional dimension . . . ." *Ibid.* The court thus acknowledged that the complaints contained "claims that, if brought alone, would be removable to federal court." *Ibid.*

The complaints also included state-law claims that were "grounded in the administrative record." Pet. App. 20a. The court of appeals recognized that under *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), and *Horton*

v. Liberty Mutual Insurance Co., 367 U.S. 348 (1961), "a state judicial proceeding to conduct de novo review of a state administrative decision is a 'civil action[] . . . of which the district court has original jurisdiction' within the meaning of 28 U.S.C. § 1441(a)." Pet. App. 11a (brackets and ellipsis in original). The court nevertheless rejected this result for cases in which "the state administrative review scheme provides for deferential review of a state agency's decision." *Ibid.* As the court of appeals saw it, in such cases, deferential review "would require the district court to perform an appellate role." *Id.* at 14a. This "function . . . could [not] be described as a 'civil action' within its original jurisdiction," because "an appellate function . . . is inconsistent with the character of a court of original jurisdiction." *Ibid.*

To determine whether this case was a "civil action" within the district court's "original jurisdiction," the court of appeals turned to Illinois law to analyze the type of review a state court would give to ICS's claims. Judicial review of nonconstitutional questions is a statutory procedure under the Illinois Administrative Review Law, which requires courts to confine their review to the record of proceedings before the administrative agency and to apply a "deferential standard of review" to challenged agency decisions. Pet. App. 18a-19a. In addition, Illinois law recognizes that an action seeking review of an agency's decision can include "facial attacks on the constitutionality of a statute or ordinance [that] are not dependent on the factual record developed at the administrative hearing." *Id.* at 18a. Finally, Illinois law recognizes that a plaintiff aggrieved by an administrative decision may attack a statute's constitutionality as applied to his own case and that "[s]uch a claim is independent of the administrative review proceeding and is therefore plenary in its scope; the court is not confined by the administrative record." *Id.* at 20a.

The court of appeals concluded that this case was a hybrid because it presented all of these claims. ICS's

complaints asserted "facial attacks on the validity of the statute, allegations of unfairness of a federal constitutional dimension, and claims based on state grounds that . . . must be adjudicated on the basis of the administrative record." Pet. App. 20a (footnote omitted). Thus, in the court of appeals' view, this case presented the question "whether, when the state action involves both claims that, if brought alone, would be removable to federal court with issues that clearly are grounded in the administrative record, removal of the entire state action to the district court is possible." *Ibid.* The court of appeals concluded that the removal statute " 'only authorizes the removal of *actions* that are within the original jurisdiction of the federal courts.' " *Id.* at 21a (emphasis in original) (quoting *Frances J. v. Wright*, 19 F.3d 337, 340 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994)). Accordingly, the court concluded that because ICS's statutory review claims required deferential review of the administrative record, this case "cannot be termed a 'civil action . . . of which the district courts . . . have original jurisdiction' within the meaning of [S]ection 1441(a)." *Id.* at 22a (ellipses in original).

SUMMARY OF ARGUMENT

The removal statute permits removal of a state-court action if it is a "civil action . . . of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The lawsuits that ICS filed in state court seeking review of decisions of the Landmarks Commission contained claims that ICS's federal constitutional rights had been violated—claims that fell within original federal-question jurisdiction under 28 U.S.C. § 1331—joined with claims for state administrative review. It has long been settled that a case containing claims that arise under federal law joined with state-law claims that arise from the same transaction or "common nucleus of operative facts" constitutes a "civil action" within the "original jurisdiction" of the district courts. *E.g., Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349-50 (1988). Congress has codi-

fied this doctrine in the supplemental jurisdiction statute, which expressly provides that in any "civil action of which the district courts have original jurisdiction," the court has further jurisdiction over state-law claims when the claims "are so related to claims in the action that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).

The court of appeals precluded removal here based on its conclusion that state-law claims seeking deferential review of decisions of an administrative agency are not "civil actions" within the district court's original jurisdiction. This conclusion shows two critical flaws.

First, state-law claims need not independently qualify as a "civil action" within the district court's "original jurisdiction" to be cognizable by federal courts. The plain language of the supplemental jurisdiction statute makes clear that state-law claims may be heard in federal court under the district court's "supplemental jurisdiction" as long as they are part of the same case or controversy. ICS's state-law claims easily satisfy that test because they—like the federal claims—arose from the same denials of ICS's applications for demolition permits.

Second, there is in fact no reason why the district court lacks jurisdiction over cases containing claims seeking judicial review of an agency's decision. Although a proceeding before an administrative agency itself is not a "civil action" and may not be removed, it has long been settled that once that proceeding ends and a party to it seeks judicial review, the resulting judicial proceedings are removable as a "civil action." In *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), for example, the railroad had sought review of an administrative decision in state court, and this Court wrote that once a party aggrieved by an administrative decision takes "a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal

by the defendant to the United States District Court." *Id.* at 578-79. Accord *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348, 354-55 (1961). While the court of appeals endeavored to distinguish *Stude* and *Horton* on the ground that those cases involved de novo review of an agency's decision and were for that reason alone "civil actions" within "original jurisdiction," this Court in *Califano v. Sanders*, 430 U.S. 99, 105-07 (1977), settled that actions seeking to review the decisions of federal administrative agencies under the Administrative Procedure Act ("APA") are "civil actions" within "original jurisdiction" under Section 1331; and it is quite clear that APA actions ordinarily do not permit de novo review. *E.g., Camp v. Pitts*, 411 U.S. 138, 141-42 (1973) (per curiam).

There is thus no basis in the text of the pertinent jurisdictional statutes or in this Court's precedents for the conclusion that the presence of state-law claims seeking on-the-record review of an agency's decision renders a case something other than a "civil action" within "original jurisdiction." Only creation of some sort of nonstatutory administrative review exception to federal jurisdiction could support the decision below. But since, under *Califano v. Sanders*, review of federal agency action is a "civil action" within the "original jurisdiction" of the district courts, the exception would exist only for federal judicial review of state or local agency decisions. Generally, such a different treatment of state and local agency decisions is based on this Court's concern for federalism.

Federalism, however, is hardly advanced by permitting federal courts, under *Stude* and *Horton*, to hear de novo attacks on state and local administrative decisions, but yet denying those courts the ability to give deference to those decisions. Nor is federalism served by denying state and local agencies the forum of their choice when, as here, they choose to defend their decisions in federal court. Finally, a special exception to federal jurisdiction for state administrative review claims is not necessary—for reasons of

federalism or otherwise—to prevent inappropriate federal intrusion on state law. To the contrary, the abstention cases make clear that the federal court has jurisdiction over even sensitive state-law issues, although there will be narrow circumstances in which the court should decline to exercise that jurisdiction.

ARGUMENT

One long-settled proposition of law supports the exercise of federal jurisdiction over the actions ICS filed: actions in which the plaintiff claims rights under federal law are within federal jurisdiction even when those claims are joined with claims seeking relief under state law. For decades it has been settled that federal-question jurisdiction is not defeated if the complaint also contains state-law claims arising from the same controversy between the parties. Here, ICS's state-court complaints alleged separate federal and state theories of liability, but they arose from a single event—the City's refusal to issue demolition permits for ICS's landmarked property. Under the well-established doctrine of pendent jurisdiction—now codified in the supplemental jurisdiction statute—a federal court has jurisdiction to hear related state-law claims along with the claims arising under federal law.

The court of appeals concluded that this rule does not reach state-law claims subject to on-the-record review of an administrative agency's decision. There is no support for this holding in the text of the pertinent jurisdictional statutes, in this Court's decisions, or in the jurisprudential policies that govern the ability of the federal courts to hear state-law claims. In fact, this Court has rejected both premises underlying the holding below. It has held that a state-law claim seeking review of an administrative decision may be removed, and that a district court may hear an attack on a federal agency's decision even though applicable law requires deferential and on-the-record review. Combining two elements neither of which in itself has ever been thought to defeat the exercise of federal jurisdiction—state-law challenges to an agency's decision and review on a deferential standard—is surely no basis to erect a new jurisdictional limitation on the federal courts.

I. ICS'S COMPLAINTS ALLEGE FEDERAL QUESTIONS AND WERE THEREFORE REMOVABLE.

As the court of appeals acknowledged, ICS's state-court complaints contained claims arising under federal law joined with state administrative review claims. Under the plain language of the pertinent jurisdictional statutes, this type of joinder does not defeat removal jurisdiction.

A. A State-Court Complaint Alleging Federal And State Claims Is Removable.

The removal statute provides for removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Accordingly, "state court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Here, "as for many cases . . . the propriety of removal turns on whether the case falls [into] original 'federal question' jurisdiction . . . ." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 (1983). That question, in turn, depends on whether ICS's complaints were "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

That issue, however, is not controlled by whether ICS alleged state-law claims in addition to its federal claims. That much was settled by *Siler v. Louisville & N.R. Co.*, 213 U.S. 175 (1909). In that case, the railroad filed suit in federal court to enjoin a rate order issued by a state railroad commission, and alleged both federal constitutional and state-law claims. *Id.* at 176-77. The Court held that federal-question jurisdiction authorized the federal court to exercise jurisdiction over both the federal and state-law

grounds. "The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the [federal] circuit court jurisdiction, and having properly obtained it, that court had the right to decide all questions in the case . . . ." *Id.* at 191.

In *Hurn v. Oursler*, 289 U.S. 238 (1933), the Court refined this doctrine by holding that pendent jurisdiction under *Siler* over state-law claims extended to all claims that arise from the same cause of action that gave rise to the federal claims. See *id.* at 243-46. In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Court broadened this pendent jurisdiction to reach all state-law claims joined with federal claims that arise from "but one constitutional 'case.'" *Id.* at 725 (footnote omitted). And that test is satisfied when "[t]he state and federal claims . . . derive from a common nucleus of operative fact." *Ibid.*

Thus, this Court has construed Section 1331 to require only that the complaint contain some claim that invokes federal-question jurisdiction. That, then, is a "civil action" within "original jurisdiction" as that term is used in the federal-question statute. The addition of state-law claims that arise from the same nucleus of fact does not defeat jurisdiction over that civil action. *E.g., Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 349 (1988); *Aldinger v. Howard*, 427 U.S. 1, 9 (1976).

The supplemental jurisdiction statute explicitly recognizes this. It codifies the doctrine of pendent jurisdiction by providing that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jursdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Again, all that matters is the existence of a "civil action" within "original jurisdiction"; state-law claims that arise from the same constitutional "case" are within supplemental jurisdiction and are, for that reason, also within the jurisdiction of the district court.[8] Under this plain language, joinder of state-law claims arising from the same transaction as the federal claims does not destroy federal jurisdiction but rather is a basis for the exercise of supplemental jurisdiction.

For this same reason, joinder of federal and state-law claims does not defeat removal jurisdiction. The removal statute uses the same phrase as the federal-question and supplemental jurisdictional statutes. It creates removal jurisdiction for "any civil action . . . of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). These identical phrases, which arise in an interrelated statutory scheme, should surely be interpreted to have the same meaning. See, *e.g., Commissioner v. Lundy*, 116 S. Ct. 647, 655 (1996); *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1067 (1995); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). And if a consistent interpretation is given to "civil action" within "original jurisdiction," a complaint is removable even if state-law claims are joined with federal claims, for the same reason that such a complaint can be filed in the district court in the first instance: the district court's original and supplemental jurisdiction reaches all claims arising from a single transaction.

And because removal is proper whenever the district court would have had original jurisdiction had the case originally been brought there, a complaint filed in a state court containing both federal and state claims is removable. See, *e.g., Carnegie-Mellon*, 484 U.S. at 350-51

---

[8] The courts of appeals have held that Section 1367 extends the federal court's authority to hear such claims to the full constitutional extent conferred by Article III. See, *e.g., Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995); *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1018 (5th Cir.), cert. denied, 508 U.S. 956 (1993).

(pendent state-law claims properly removed under Section 1441).

The legislative history of the supplemental jurisdiction statute confirms that Congress intended to authorize the exercise of federal jurisdiction over cases in which federal and state claims are joined. The House Report explains: "In federal question cases, [the statute] broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims . . . ." H.R. Rep. No. 101-734, at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6874. It is also clear from the legislative history that these additional claims are ones over which the federal courts would not otherwise have jurisdiction. See *id.* at 27, 1990 U.S.C.C.A.N. at 6873. And both before and after the enactment of the supplemental jurisdiction statute the lower federal courts have universally held that there is federal jurisdiction over suits containing federal and state claims, including state-law challenges to the land-use decisions of local administrative agencies. See, *e.g.*, *Bickerstaff Clay Products Co. v. Harris County*, 89 F.3d 1481, 1484-85 n.4 (11th Cir. 1996) (district court had power to hear zoning claims under supplemental jurisdiction when joined with Section 1983 claims alleging takings violations); *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 96-97 (1st Cir. 1977) (pendent jurisdiction properly exercised over state-law nuisance and environmental claims joined with Section 1983 claim).

The supplemental jurisdiction statute—using identical language to the removal statute and unquestionably recognizing federal jurisdiction in cases in which state-law claims are joined with a federal claim—thus provides proof positive that a "civil action" within "original jurisdiction" is removable when federal and state claims are joined. We turn therefore to the question whether ICS's complaints fall within original—and hence removal—jurisdiction because they alleged claims falling within federal-question jurisdiction, properly joined with state-law claims.

B. The Complaints At Issue Here Allege Claims That Arise Under The Federal Constitution.

The City removed ICS's state-court complaints from state to federal court because those complaints contained claims within federal-question jurisdiction—namely that the Landmarks Commission's refusal to issue demolition permits, as well as the Landmarks Ordinance itself, violated ICS's rights under the United States Constitution. J.A. 22-33, 73-76.[9] The complaints, although not broken out into separate counts, contain numerous allegations of federal constitutional violations. The first complaint specifically alleged that the particular ordinance authorizing the Landmarks Commission's preliminary designation of ICS's property as a landmark deprived ICS of its right under the United States Constitution to due process of law. *Id.* at 22-23. The complaint further alleged that the Landmarks Ordinance's exemption for property used for religious purposes violated federal due process and equal protection guarantees. *Id.* at 23-24. And the complaint alleged that the ordinance landmarking this particular property was a taking of property without the payment of just compensation in violation of the Takings Clause of the Fifth Amendment and also constituted arbitrary legislative action in violation of due process and equal protection principles. *Id.* at 24-26. The complaint further alleged that the Landmarks Commission took a variety of steps to deprive ICS of a fair hearing in violation of the Due Process Clause. *Id.* at 26-32, 33. In ICS's second state-court complaint, which challenged the denial of its application for an economic hardship exception, there are six assignments of error that rest solely on the United States Constitution, and two more that rest on both the Federal and the Illinois Constitutions. *Id.* at 73-76. In both complaints

[9] The removal petitions cited 28 U.S.C. § 1441(b), which provides for removal "founded on a claim or right arising under the Constitution, treaties or laws of the United States . . . without regard to the citizenship or residence of the parties."

ICS asked for a declaration that both the Landmarks Ordinance itself and the particular ordinance landmarking ICS's property were unconstitutionl and that the Landmarks Commission's decisions on its applications were illegal as well. *Id.* at 35, 78.[10]

A case "arise[s] under" federal law, within the meaning of Section 1331, when "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank*, 299 U.S. 109, 112 (1936). Accord, *e.g.*, *Christianson v. Colt Industries Operating Co.*, 486 U.S. 800, 808 (1988); *Franchise Tax Board*, 463 U.S. at 10-11; *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974) (per curiam).[11] Here, ICS forwarded claims that had, as an essential element, a right or immunity created by the Constitution.

ICS styled its complaints as complaints for administrative relief pursuant to the Illinois Administrative Review Act, 735 ILCS paras. 5/3-101 to 5/3-112. Such actions are proceedings in which the record before the agency is reviewed to ensure its compliance with all applicable law. See *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 427, 551 N.E.2d 640, 645 (1990). As the court of appeals acknowledged (Pet. App. 17a-20a), administrative review complaints properly include claims

[10] Indeed, when ICS filed an amended complaint in the district court, it acknowledged that its lawsuit raised federal claims that arose under federal law within the meaning of Section 1331. See J.A. 143.

[11] In addition to federal-question jurisdiction under Section 1331, the district courts have original jurisdiction over any action "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States . . . ." 28 U.S.C. § 1343(3). We do not separately discuss Section 1343(3), since the jurisdictional inquiry under that Section does not differ meaningfully from the inquiry under Section 1331.

that the administrative decision violates a federal constitutional right of the aggrieved party. See *Howard v. Lawton*, 22 Ill. 2d 331, 333, 175 N.E.2d 556, 557 (1961); *Winston v. Zoning Board of Appeals*, 407 Ill. 588, 591-92, 95 N.E.2d 864, 867-68 (1950). On constitutional claims, the reviewing court may admit evidence beyond the administrative record. See *Stratton*, 133 Ill. 2d at 428-30, 551 N.E.2d at 646. And when such claims are "an integral part of review" of a local agency's decision applying a local ordinance, they do "not have to be pleaded in a separate count." *Howard*, 22 Ill. 2d at 333; 175 N.E.2d at 557.[12]

The federal constitutional claims alleged in the administrative review complaints arose under federal law. ICS straightforwardly claimed that the United States Constitution granted it a right to have the Landmarks Commission's decisions set aside. These claims were in no way dependent on state law. Rather, to obtain relief, ICS would have to establish a violation of its federal constitutional rights—no more and no less. Thus it asserted a federal "right or immunity." This is the same principle that governs the "complete preemption" cases, which "arise under" federal law within the meaning of Section 1331 even when a complaint purports to plead only a state-law claim. If the state-law theory advanced in such a complaint falls within an area that is completely preempted by federal law, the action is within federal-question jurisdiction, and therefore is removable, because there simply is no state law to apply. See, *e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. at 393; *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63-67 (1987); *Franchise Tax Board*, 463 U.S. at 24. Here, ICS's federal constitutional claims that it was entitled to demolition permits regardless of any state or local statute, ordinance, or rule of law arose under federal law

[12] In fact, under Illinois practice it is always proper to plead an equitable action in a single count. See Ill. Sup. Ct. R. 135(a).

for this same reason. On those claims, there is simply no state law to apply.

For this reason, ICS's election to use its state statutory administrative review remedy—and to plead in a single count—does not mean that it failed to raise claims under federal law. ICS chose to plead numerous federal constitutional claims and thereby to invoke its federal rights. ICS's desire to litigate claims arising under federal law in state court cannot defeat the statutory right of removal. As the Court explained in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the federal "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum.'" *Id.* at 397 n.2 (quoting 14 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3722 at 564-66 (1976)). See also *Metropolitan Life Insurance*, 481 U.S. at 63-67 (a plaintiff's decision to plead a state claim will not defeat removal when federal law governs the plaintiff's rights). Instead, the courts will "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Federated Department Stores*, 452 U.S. at 397 n.2 (citation omitted). See also, *e.g.*, *Bell v. Hood*, 327 U.S. 678, 681-82 (1946) (complaint need not spell out federal constitutional claims specifically to sustain federal-question jurisdiction); *Hopkins v. Walker*, 244 U.S. 486, 489-91 (1917) (where "form and substance" of plaintiffs' complaint states a claim under the laws of the United States, federal jurisdiction exists).

To be sure, the administrative review procedure invoked by ICS was created by state statute, and it is frequently the case, as Justice Holmes wrote, that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). The Court acknowledged in *Franchise Tax Board*, however, that "it is well settled that Justice Holmes'

test is more useful for describing the vast majority of cases that come within the district court's original jurisdiction than it is for describing which cases are beyond district court jurisdiction." 463 U.S. at 9. The Court added that "even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle." *Ibid.* (citing *Flournoy v. Wiener*, 321 U.S. 253, 270-72 (1944) (Frankfurter, J., dissenting)). Here, although a state statute authorized the proceeding by which ICS sought review of the refusal to issue it demolition permits, its complaints plainly alleged that it was entitled to those permits as a matter of federal constitutional right. Such a claim arises under federal law precisely because it is based on a "right or immunity created by the Constitution or laws of the United States . . . ." *Franchise Tax Board*, 463 U.S. at 10-11 (quoting *Gully*, 299 U.S. at 112).[18]

Of course, even if ICS's federal constitutional claims were deemed to arise under the state administrative review statute rather than federal law, that would not defeat federal-question jurisdiction here because they could not be adjudicated without a determination whether federal law granted ICS the rights it asserted. In *Franchise Tax Board*, the Court wrote that it has "often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction

[18] When a plaintiff alleges a violation of federal law, but federal law grants it no right of action to seek relief, the claim does not arise under federal law. That was the holding in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 (1986). Here, ICS alleged that the refusal to approve its applications for demolition permits denied it due process and constituted a taking of its property without payment of just compensation; and the existence of a right of action for a violation of these federal rights by the decision of a state or local agency is clear. See, *e.g.*, *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 366 (1989) (Equal Protection Clause); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (Takings Clause); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Due Process Clause).

of federal law." 463 U.S. at 9. Thus, federal-question jurisdiction extends to " 'those cases in which a well-pleaded complaint establishes *either* that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.' " *Christianson*, 486 U.S. at 808 (quoting *Franchise Tax Board*, 463 U.S. at 27-28 (emphasis added)).

For example, in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), a shareholder brought suit to enjoin officers of the trust company from investing in federal loan bonds because, the shareholder alleged, such an investment was beyond the bank's powers, and the acts of Congress authorizing the bond sale were unconstitutional. See *id.* at 195-96, 198. As the Court explained, "[t]he general rule is that, where it appears . . . that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such Federal claim is not merely colorable, and rests upon a reasonable foundation, the district court has jurisdiction . . . ." *Id.* at 199. On this basis, the Court determined that the federal court had jurisdiction over Smith's suit, purportedly brought under state law, because "[t]he decision depends upon the determination of this [federal constitutional] issue." *Id.* at 201. Accord *Hopkins*, 244 U.S. at 489 (case "aris[es] under" laws of the United States "where an appropriate statement of the plaintiff's cause of action . . . discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of Congress"). Thus, although the case may not arise under federal law when federal law is merely one element of a state-law theory of liability, it does arise under federal law when the plaintiff's claims depend solely on the existence of a constitutional right. Cf. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986) (jurisdictional inquiry turns on whether federal or state-law issues predominate).

Under this test, even if ICS's complaints are read as predicated solely on a state-created right to obtain judicial review of an administrative decision, they still assert a right arising under federal law. ICS explicitly alleged that the Landmarks Commission's actions were unlawful because they violated its federal constitutional rights. The disposition of these claims is solely dependent on the resolution of substantive issues of federal law; state law cannot be used to adjudicate these claims.[14]

Accordingly, ICS's federal constitutional allegations, although advanced in the framework of administrative review complaints, turned solely on issues of federal law. These complaints arose under federal law within the meaning of Section 1331.

C. ICS's Complaints Invoked Federal Jurisdiction.

ICS's complaints properly invoked federal jurisdiction over this action. A complaint that makes claim to rights arising under federal law, even if those claims prove meritless, supports federal jurisdiction as long as those claims are not "frivolous or so insubstantial as to be beyond the jurisdiction of the District Court." *Hagans v. Lavine*, 415 U.S. 528, 539 (1974); accord, *e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993); *Duke*

---

[14] The provision in the Administrative Review Law for filing administrative review actions in state court (see 735 ILCS para. 5/3-104) does not affect removability. It is well settled that a State cannot enlarge or restrict the jurisdiction of the federal courts. See *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 253 (1905). As the Court explained in *Barrow v. Hunton*, 99 U.S. 80 (1879), "[i]f the State Legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to those courts." *Id.* at 85. Thus, in *Commissioners of Road Improvement District No. 2 v. St. L. Sw. Ry. Co.*, 257 U.S. 547 (1922), for example, the Court allowed removal even though state procedures required the case to be filed in a state court. *Id.* at 561-62.

Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 70-71 (1978); *Bell v. Hood*, 327 U.S. at 683-84. ICS's claims challenging the constitutionality of the Landmarks Commission's decisions and seeking a declaration to that effect were sufficiently substantial to avoid that difficulty. While we agree with the district court that those claims are in fact without merit, the district court's opinions make clear that these claims were not wholly illusory or frivolous. See Pet. App. 33a-46a; J.A. 134-39. Indeed the court of appeals agreed that this case includes "claims that, if brought alone would be removable to federal court." Pet. App. 20a.

That should have been enough to sustain removal jurisdiction. As we explain above, as long as a complaint contains some claims that invoke federal-question jurisdiction, it constitutes a "civil action" within the district court's "original jurisdiction" even if those claims are joined with state-law claims. Related state-law claims can be heard under the district court's supplemental jurisdiction. Under that statute, when there is a "civil action" within the district court's "original jurisdiction," that court "shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy." 28 U.S.C. § 1367(a). Here, ICS's state-law claims arise from the same nucleus of operative fact as its federal claims—its inability to obtain demolition permits for its landmarked property. And in such cases, under the supplemental jurisdiction statute, the district court "shall have supplemental jurisdiction." [15]

Even if ICS's state-law claims were deemed to be separate from its federal claims and hence not within the district court's supplemental jurisdiction, that would not de-

[15] At most, the statute permits a district court to decline to exercise supplemental jurisdiction when there are novel or complex issues of state law, when state-law claims predominate over federal claims, or in other exceptional circumstances. See 28 U.S.C. § 1367(c). None of these exceptions applies here.

feat removal. That is because the removal statute also provides: "Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed . . . ." 28 U.S.C. § 1441(c).[16] Thus, it hardly matters whether ICS's state-law claims are considered sufficiently related to its federal claims to fall within supplemental jurisdiction; in either case removal was proper here.

Of course, the court of appeals did not hold that ICS's complaints were non-removable because they contained no claims arising under federal law, nor did it hold that the complaints were non-removable merely because they contained state-law claims. Rather the court below held that when state-law claims that seek deferential review of an administrative decision based on the record before the agency are present in a complaint, such claims defeat removal. It is to that question that we next turn.

II. THE PRESENCE OF A STATE ADMINISTRATIVE REVIEW CLAIM IN A STATE-COURT COMPLAINT DOES NOT DEFEAT REMOVABILITY.

The court of appeals' holding that the inclusion in ICS's complaints of state-law administrative review claims over which a court would not exercise de novo review made the lawsuit something other than a "civil action" within "original jurisdiction" and hence non-removable is erroneous for three reasons. First, under the plain language of the supplemental jurisdiction statute, such state-law claims need not independently qualify as a "civil action" within the federal court's "original jurisdiction" as long as they constitute "claims" that are sufficiently "related to" a "civil action" within "original jurisdiction." Second, there is

[16] Under this statute, at most, a district court "may remand all matters in which State law predominates." 28 U.S.C. § 1441(c).

nothing about actions seeking on-the-record judicial review of an administrative decision that renders them beyond the jurisdictional competence of the district courts. Third, even if a state-court complaint contains some claims not within any form of federal jurisdiction, that does not defeat removal of the claims that are within federal jurisdiction.

A. ICS's State Administrative Review Claims Fall Within Supplemental Jurisdiction.

The court of appeals concluded "if even one claim in an action is jurisdictionally barred from federal court . . . or does not fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court." Pet. App. 21a (quoting *Frances J. v. Wright*, 19 F.3d 337, 341 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994)). The court of appeals failed to recognize, however, that all of ICS's claims fall within federal jurisdiction—the federal claims within original jurisdiction and the state claims within supplemental jurisdiction.

The plain language of the supplemental jurisdiction statute, as we explain above, makes clear that when a complaint contains claims falling within federal-question jurisdiction, the district court also has supplemental jurisdiction over "all other claims" that form part of the same case or controversy. As we also explain above, ICS's state-court complaints contained claims falling within federal-question jurisdiction, and its state-law claims derived from the same nucleus of operative fact. For just these reasons, the district court determined that the requirements of supplemental jurisdiction were satisfied, and the court exercised that jurisdiction here. See Pet. App. 45a-46a.

The court of appeals explained at some length why it believed that ICS's state-law administrative review claims did not constitute a "civil action" within "original jurisdiction" (see Pet. App. 7a-19a), but apparently failed to consider whether these were "claims" within the meaning of the supplemental jurisdiction statute. Whether or not these claims independently qualify as a "civil action" within "original jurisdiction," surely these state-law bases for challenging the Landmarks Commission's decisions are "claims," as the court of appeals appears to have acknowledged. See *id.* at 4a, 20a, 23a (referring to ICS's administrative review claims as "claims"). And the whole point of the supplemental jurisdiction statute is, of course, that the federal court need not have original jurisdiction over the claims falling within its supplemental jurisdiction. Rather, as we explain above, the doctrines of pendent, and now supplemental, jurisdiction were created precisely to provide jurisdiction for claims that did not independently meet federal jurisdictional requirements, but that were joined with a claim that did.

To the extent that the court of appeals addressed this portion of our submission, the court appears to have rejected reliance on Section 1367(a) not because ICS's state-law claims were not "claims" sufficiently "related to" its federal claims within the meaning of the supplemental jurisdiction statute, but instead because it considered claims seeking deferential review based on an agency record to be a form of "appellate review [that] can hardly be characterized as a 'claim' in an 'original action.'" Pet. App. 22a. But a requirement that supplemental claims be an "original action" involving de novo review appears nowhere in the text of Section 1367—the statute refers only to "claims" that are "related to" the "civil action" within "original jurisdiction." And the statute plainly contains no exemption to supplemental jurisdiction for state administrative review claims, nor for claims involving local land-use issues, as we explain above. At most the statute authorizes a district court to decline to exercise supplemental jurisdiction over state-law issues in certain narrow circumstances (see 28 U.S.C. § 1367(c)) and plainly does

not contain the blanket administrative-review exception to federal jurisdiction announced by the court below.

Accordingly, whether or not ICS's state-law claims could be considered a "civil action" within "original jurisdiction," they were within the district court's supplemental jursdiction because they were joined with nonfrivolous, related federal-law claims. And when all the claims in a complaint are within either original or supplemental jurisdiction, the entire case is removable. See, *e.g.*, *Zuniga v. Blue Cross and Blue Shield of Michigan*, 52 F.3d 1395, 1399 (6th Cir. 1995) (action removable where due process claim provided federal question jurisdiction and state-law contract and statutory claims fell within supplemental jurisdiction); *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 785-87 (3d Cir. 1995) (action that included Section 1983 claims and supplemental state-law tort claims properly removed under Section 1441(a)). See also *Carnegie-Mellon*, 484 U.S. at 350-51 (removal of pendent claims prior to enactment of supplemental jurisdictional statute proper).

B. Administrative Review Claims Can Be Heard By The District Courts.

In any event, the court of appeals was incorrect that an action seeking deferential review on the record of proceedings before a state or local administrative agency is not removable because "removal to federal court would require the district court to perform an appellate role . . . that could [not] be described as a 'civil action' within its original jurisdiction." Pet. App. 14a. This conclusion is squarely inconsistent with the scope of the district court's jurisdiction to review federal agency decisions.

The Administrative Procedure Act ("APA") grants a right of judicial review to persons aggrieved by a decision of a federal administrative agency. See 5 U.S.C. §§ 701-706. Yet the APA ordinarily does not permit trial de

novo in the district court. See *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973) (per curiam). The statute also requires courts to grant a substantial measure of deference to an agency's decision; an agency's decision will be set aside only where "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" upon review of the "whole record." 5 U.S.C. § 706.[17] And this is a narrow form of review. As the Court explained in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), "the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Id.* at 43. The APA thus requires courts to grant substantial deference to the decision of the agency. See, *e.g.*, *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). Indeed this point was settled as early as *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951), in which the Court upheld an agency's decision as supported by the record because the Court found that the testimony before the agency was "consistent and credible" and its finding was a rational one. See *id.* at 508.

Despite the deferential review of federal agency actions, this Court, in *Califano v. Sanders*, 430 U.S. 99 (1977), held that the district courts have original federal-question jurisdiction under Section 1331 over actions seeking review of decisions under the APA. See *id.* at 105-07. See also *McCartin v. Norton*, 674 F.2d 1317, 1320 (9th Cir. 1982) ("[w]hile the Administrative Procedure Act does not confer jurisdiction on the federal courts to review agency action, it is now clear that 28 U.S.C. § 1331[] does"). Thus the very form of review that the court of appeals here deemed inconsistent with a district court's removal jurisdiction—deferential review based on the

---

[17] In certain circumstances, the agency decision also can be set aside where it is not supported by substantial evidence. See 5 U.S.C. § 706(2)(E); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971).

agency record rather than de novo review in the district court—was held to qualify as a "civil action" within "original jurisdiction" in *Califano v. Sanders*. And, as we explain in Part I.A above, if an action falls within federal-question jurisdiction under Section 1331, it is also removable under Section 1441.

The holding below can be reconciled with federal-question jurisdiction over APA actions only if district courts are considered jurisdictionally competent to provide deferential review of federal but not state or local administrative decisions. Yet, there is nothing in the text of the pertinent jurisdictional statutes to suggest that a district court can perform what the court of appeals branded an "appellate role" when it reviews the decision of a federal agency under federal law, but not when it reviews the decision of a state agency under state law. The plain meaning of the phrase "civil action" would seem to include all administrative review claims—administrative review claims are "civil" in character and involve an "action" seeking judicial redress for an alleged violation of law. And in fact, this Court has not recognized any special jurisdictional rules governing state-law challenges to an administrative decision. To the contrary, the Court has acknowledged at least twice that actions seeking to review the decision of an administrative agency on state-law grounds qualify as "civil actions" within "original jurisdiction" under the diversity jurisdiction statute, which uses the same terminology found in the federal-question and removal statutes.[18]

---

[18] The diversity jurisdiction statute provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States . . . .

28 U.S.C. § 1332.

In the first of those cases, *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), the railroad filed suit in state court challenging the amount of the condemnation damages that a county commission had assessed against it for the acquisition of certain land, and then removed the action to federal court because the parties were of diverse citizenship. See *id.* at 576. The Court acknowledged that a proceeding before an administrative agency is not a "civil action," but that once judicial review is sought in state court, the proceeding becomes a removable civil action:

> [t]he proceeding before the [commission appointed by the] sheriff is administrative until the appeal has been taken to the district court of the county. Then the proceeding becomes a civil action pending before "those exercising judicial functions" for the purpose of reviewing the question of damages. When the proceeding has reached the stage of a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action and subject to removal by the defendant to the United States District Court.

Id. at 578-79 (citation omitted). In the end, the Court determined that removal was improper but only because the case had been removed by the railroad, which, as the plaintiff in state court, was not entitled to remove the case. See *id.* at 579-80. See also *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 195 (1959) ("[a]lthough holding [in *Stude*] that the [railroad] could not remove a state condemnation case to the Federal District Court on diversity grounds because [it] was the plaintiff in the state proceeding, the Court clearly recognized that the defendant in such a proceeding could remove in accordance with § 1441 and obtain a federal adjudication of the issues involved").

The railroad had also filed a second action, this one in federal district court. See 346 U.S. at 576. In the portion of the *Stude* opinion upon which the court of appeals relied

here, this Court ordered that action dismissed because it challenged only one portion of the proceedings—the amount of the condemnation damages award—while the judgment underlying that award relating to the landowner's substantive right to damages and the railroad's eminent domain powers was contested elsewhere. See *id.* at 582. Thus, the railroad was attempting to "separate the question of damages and try it apart from the substantive right from which the claim for damages arose." *Ibid.* It was in that context that the Court wrote that a district court "does not sit to review on appeal action taken administratively or judicially in a state proceeding." *Id.* at 581. That, then, is the type of "appellate" proceeding to which the Court objected—one in which the plaintiff seeks to review only a particular finding of an agency even though the rest of the "case," in the constitutional sense, is pending elsewhere.[19] Indeed, the Court suggested that if the suit had been properly brought as an action seeking condemnation of property, then the Court would have had jurisdiction over the matter. See *id.* at 582.

In the second case, *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961), the dicta in *Stude*, acknowledging that an action contesting the decision of an administrative agency was removable, was turned into a holding. *Horton* was a diversity action filed in federal court by Liberty, an insurance company, challenging under state law a workers' compensation award made to Horton by the Texas Industrial Accident Board. See *id.* at 349-50. The Court concluded that the action was a civil action, capable of being heard in the first instance in district court "as any other suit" because when it was filed, the case was withdrawn from the Board. See *id.* at 354. Thus, under *Horton* an action to review the decision of a state administrative agency constitutes a "civil action" within the court's "original jurisdiction" under the diversity jurisdiction statute. *See id.* at 355.

[19] That conclusion is consistent with the Court's holding in *Barrow v. Hunton* that a proceeding related to another suit in such a way that it is merely a "supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it" will not be considered a "suit" for purposes of original federal jurisdiction or removal. 99 U.S. at 82-88. In *Barrow*, the Court concluded that a proceeding to obtain the nullity of a judgment, which had to be brought in the same court that rendered the judgment, was too much a supplemental proceeding and therefore was not a suit. *See id.* at 85. See also *First National Bank v. Turnbull*, 83 U.S. (16 Wall.) 190 (1873) (action to recover property in judgment-debtor's possession considered an "auxiliary to the original action"). This consideration is not at issue here.

Horton and the dicta in *Stude* are joined by numerous other cases in which this Court has recognized that there is federal jurisdiction over actions to review the decision of a state agency on state-law grounds. See, *e.g.*, *Commissioners of Road Improvement District No. 2 v. St. L. Sw. Ry. Co.*, 257 U.S. 547, 560-62 (1922) (appeal of assessors' proceeding to state county court to set damages arising from road improvement was properly removed to federal court on diversity grounds); *Siler*, 213 US. at 193-98 (action to enjoin rate order properly heard under pendent jurisdiction); *Union Pacific Ry. Co. v. Meyers*, 115 U.S. 1, 18-23 (1885) (appeal of valuation of property tried before mayor was properly removed to federal court under federal-question jurisdiction); *Mississippi and Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406-07 (1879) (diversity action to value condemned property properly removed to federal court). There is thus plainly no rule forbidding federal courts from reviewing administrative decisions of state or local officials.

The historical understanding of the authority of the federal courts to review administrative decisions also makes clear that administrative review cases are "civil actions" within "original jurisdiction" regardless of the scope of review exercised. The Judiciary Act of 1789 gave federal courts jurisdiction, as a matter of "original cognizance" and as a matter of removal, over a "suit of

a civil nature at common law or in equity" where those suits met requirements such as diversity between the parties. See Act of Sept. 24, 1789, §§ 11, 12, 1 Stat. 73, 78-80. It is thus appropriate to begin the historical inquiry with the most basic denominator: the term "suit." Early on, this Court found that the term "suit" has a "comprehensive" definition such that it "appl[ies] to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him . . . . [I]f a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit." *Weston v. City Council*, 27 U.S. (2 Pet.) 449, 464 (1829).

Since administrative agencies were not easily classified as "courts," the inquiry for purposes of removal jurisdiction turned on the nature of the proceeding and the function of the administrative body. When the proceeding and the function of the administrative body were wholly administrative in nature, the proceeding was not considered a suit. See, *e.g.*, *County of Upshur v. Rich*, 135 U.S. 467 (1890) (county court not permitted duties of a judicial nature and thus assessment not a suit removable to federal court). But where the proceeding was brought before a body that exercised judicial functions, by appeal or otherwise, it became a suit over which the courts had cognizance. In *Upshur*, the Court explained the distinction:

> [A] proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character and cannot, in any just sense, be called a suit; [and] an appeal, in such a case, to a board of assessors or commissioners having no judicial powers and only authorized to determine questions of quantity, proportion, and value, is not a suit, [but] such an appeal may become a suit if made to a court or tribunal having power to determine questions

> of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other.

135 U.S. at 477.[20] *Mississippi and Rum River Boom Co.* reflects the same distinction. That case grew out of a "proceeding [before] commissioners appointed to appraise [certain] land," which the Court acknowledged "was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms." 98 U.S. at 406. The Court then observed: "But when it was transferred to the [state] District Court by appeal from the award of the Commissioners, it took, under the statute of the State, the form of a suit at law and was thenceforth subject to its ordinary rules and incidents. . . ." *Id.* at 406-07. At that point, the suit could be removed to federal court. See *ibid.*

As for the "civil" component of the phrase "suit of a civil nature," in both the Judiciary Act of 1789 (Act of Sept. 24, 1789, §§ 11-12, 1 Stat. 73, 78-80) and the later federal-question statute (Act of March 3, 1875, § 1, 18 Stat. 470), that term designates simply a suit "in contradistinction to one involving 'crimes and offenses.'" *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 270 (1935). As the Court explained in *Milwaukee County*,

---

[20] The Court added:

> At the same time we do not lose sight of the fact, presented by every day's experience, that the legality and constitutionality of taxes and assessments may be subjected to judicial examination in various ways, —by an action against the collecting officer, by a bill for injunction, by certiorari and by other modes of proceeding. Then, indeed, a suit arises which may come within the cognizance of the federal courts, either by removal thereto, or by writ of error from this court, according to the nature and circumstances of the case. Even an appeal from an assessment, if referred to a court and jury, or merely a court, to be proceeded in according to judicial methods, may become a suit within the Act of Congress.

135 U.S. at 473.

"suits of a civil nature . . . are those which do not involve criminal prosecution or punishment, and which are of a character traditionally cognizable by courts of common law or equity." *Id.* at 271. It was on this same understanding that the Court in *Ames v. Kansas*, 111 U.S. 449 (1884), concluded that a quo warranto action could be removed, for it was civil rather than criminal in nature. *Id.* at 460-61. See also *id.* at 460 (stating that, under Kansas law, "[a]ctions are of two kinds, *first*, civil, *second*, criminal. A criminal action is one prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof. Every other action is a civil action." (citations omitted) (emphasis in original)).

The phrase "suit of a civil nature in law and equity" remained in the statutory provisions conferring federal-question jurisdiction and removal jurisdiction until the recodification of the Judicial Code in 1948. Sections 1331 and 1441 were then amended with the substitution of the now-familiar term "civil action." 1948 Judicial Code and Judiciary Act, 62 Stat. 930; 62 Stat. 937-38; see *Finley v. United States*, 490 U.S. 545, 554 (1989). The change made them consistent with Rule 2 of the Federal Rules of Civil Procedure, which provides that "[t]here shall be one form of action to be known as civil action." See H.R. Rep. No. 308, at App. 1701, 1833, 1854 (1947) (Reviser's notes) (explaining that the term "civil action" was substituted in both Sections 1331 and 1441 to be in harmony with Fed. R. Civ. P. 2). And Rule 2 in turn makes clear that the phrase "civil action" has the broadest possible scope, including any action that a district court might hear: "There shall be one form of action to be known as a 'civil action.'" Fed. R. Civ. P. 2.

These historical underpinnings show that ICS's claims —the state-law claims as well as the federal ones— squarely present a "civil action" within the meaning of Sections 1331 and 1441. The decisionmaking responsibilities to be exercised by the state court in which the

complaints were filed were not of an executive nature but were incontestably judicial in nature, and were exercised after a final decision had been rendered by the Landmarks Commission. The proceeding was civil rather than criminal. In fact, the particular statutory procedure at issue here—the statutory equivalent of a common-law certiorari action—is a familiar judicial procedure.[21] In *Upshur*, for example, the Court noted that judicial review of a property valuation may take the form of a certiorari proceeding: "the legality and constitutionality of taxes and assessments may be subjected to judicial examination in various ways, [including] by certiorari." 135 U.S. at 473. Accord *Degge v. Hitchcock*, 229 U.S. 162, 170-71 (1913) (common law writ of certiorari as a means of appealing final decision of inferior tribunal where there "otherwise would be a denial of justice"). Cf. *Ames v. Kansas*, 111 U.S. at 461, 472 (statutory action lying in quo warranto was a "civil action" within federal jurisdiction and removable). Thus, ICS's complaints constituted a "civil action."

All told, ICS's complaints were civil actions within original jurisdiction and could therefore be removed. Indeed, the court of appeals doubted this conclusion for only one reason: some—although not all—of the state-law claims pleaded in ICS's complaints require the reviewing court to give deference to the Landmarks Commission's decisions. See Pet. App. 11a, 19a.[22] While the

---

[21] Under Illinois law, the "substantial differences that at one time existed [between certiorari and statutory administrative review] have been all but obliterated." *Smith v. Department of Public Aid*, 67 Ill. 2d 529, 541, 367 N.E.2d 1286, 1293 (1977).

[22] Under Illinois law, the court determines whether the agency's determination was "arbitrary, unreasonable or capricious." *Monsanto Co. v. Pollution Control Board*, 67 Ill. 2d 276, 289, 367 N.E.2d 684, 689 (1977). See also *Hanrahan v. Williams*, 174 Ill. 2d 268, 272-73, 673 N.E.2d 251, 253-54 (1996). Findings of fact are reviewed deferentially but will be reversed if contrary to "the manifest weight of the evidence." *Monsanto*, 67 Ill. 2d at 289, 367

court of appeals was correct about the standard of review for some of the claims, it erred in finding that the scope of review is determinative of removal jurisdiction.

This Court, in prior decisions considering whether federal jurisdiction existed, has not worried about whether review of a state administrative proceeding under state law was de novo or deferential. For example, in *Commisioners of Road Improvement District No. 2*, the Court noted that the assessment suit was "to declare and enforce a liability of lands and their owners as it stands on present and past facts under a law and rules already made by the legislature and administrative officers." 257 U.S. at 554. Thus the Court allowed removal of an action challenging the decision of a county assessment board without inquiry into whether deference to the board's judgment was required. And the Court's opinion in *Stude* does not even mention the standard of review of the valuation proceeding.[23] The courts of appeals also have not, until recently, been concerned about this issue. In the leading case, *Range Oil Supply Co. v. Chicago, R.I. & P.R. Co.*, 248 F.2d 477 (8th Cir. 1957), the court held that Range Oil's state action seeking to set aside a state railroad commission's order as unlawful and unreasonable was removable as a "civil action" within the district court's "original jurisdiction." See *id.* at 478-79. See also *Linwood v. Board of Education*, 463 F.2d 763, 770 (7th Cir.), cert. denied, 409 U.S. 1027 (1972). Indeed the commentators have taken the holding of *Range Oil Supply* as settled law. See 1A James W. Moore, MOORE'S FEDERAL PRACTICE ¶ 0.157 [4.-3] at 73-74 (2d ed. 1996); 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3721 at 206-07 (1985).[24]

The most potent reason to reject the holding of the court of appeals, however, is that there is nothing in the text of the applicable jurisdictional provisions that supports the conclusion that while de novo review proceedings are "civil actions" within "original jurisdiction," on-the-record review actions are not. Moreover, such a conclusion would be in the teeth of the holding in *Califano v. Sanders*, in which precisely the type of review that the court below considered "appellate review" outside the competence of a district court was held to constitute a "civil action" within "original jurisdiction" under Section 1331. ICS has never suggested that *Califano v. Sanders* should be overruled. Nor should it be; Congress has not seen fit to revise the pertinent jurisdictional statutes in the two decades since that decision, and if *Califano v. Sanders* were to be overruled, a vast quantity of federal administrative litigation would prove jurisdictionally defective, since, as the Court there noted, the APA itself does not grant jurisdiction to the district courts. See 430 U.S. at 105. Nor is there anything in the relevant statutes to suggest that a district court can provide appellate style review when the decision of a federal agency is to be reviewed under federal law, but not when a decision of

---

N.E.2d at 689. Questions of law are reviewed de novo. See *Branson v. Department of Revenue*, 168 Ill. 2d 247, 254, 659 N.E.2d 961, 965 (1995); *Envirite Corp. v. Illinois Environmental Protection Agency*, 158 Ill. 2d 210, 214, 632 N.E.2d 1035, 1037 (1994). And on constitutional claims, no deference need be given even on the facts since additional evidence can be proffered to the reviewing court. See *Stratton*, 133 Ill. 2d at 428-30, 551 N.E.2d at 646.

[23] *Stude* was a de novo proceding, since Iowa law provided that the action was one that would be " 'tried as in an action by ordinary proceedings.' " 346 U.S. at 576 (quoting Iowa Code § 472.21). For this reason as well, the language in the opinion concerning "appellate review" of a state agency's findings has nothing to do with a deferential scope of review. In any event, if *Stude* could be read to bar even de novo review of administrative decisions, it would have been overruled by *Horton*.

[24] And indeed it was for nearly four decades, until the two appellate decisions on which the court below relied. See *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995); *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995).

a state or local agency is to be reviewed under state law. A case seeking on-the-record administrative review, thus, does not seek the type of judicial review that federal courts are not competent to provide.

C. Even The Presence Of State-Law Claims Not Within Original Or Supplemental Jurisdiction Does Not Defeat Removal.

Even if federal courts are forbidden to provide on-the-record review of agency decisions under state law, that does not explain why the court of appeals could properly order the entire case—including ICS's constitutional claims seeking de novo review—remanded to state court. No decision of this Court—and nothing in any statute—suggests that joining claims that are not within original federal jurisdiction to claims that are defeats removal. To the contrary, as we explain above, both the removal and supplemental jurisdiction statutes permit federal jurisdiction to be exercised when state and federal claims are joined, and authorize, at most, remand to state court of only those claims on which state law predominates.

To reach the result that it did, the court of appeals relied on its prior opinion in *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994), in which the court had held that a case containing claims barred by the Eleventh Amendment is non-removable because the removal statute " 'only authorizes the removal of *actions* that are within the original jurisdiction of the federal courts.' " Pet. App. 21a (emphasis in original) (quoting *Frances J.*, 19 F.3d at 340). But the applicable jurisdictional framework here is much different from that in cases in which the removed case contains claims barred by the Eleventh Amendment. The Eleventh Amendment is an affirmative jurisdictional bar to the exercise of federal jurisdiction over claims against States, and it thus limits the exercise of pendent (and now supplemental jurisdiction) no less than any other type of federal jurisdiction. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117-21 (1984). Here, there is no

similar jurisdictional bar. The Eleventh Amendment does not apply here; this case involves only a decision of a local government agency. See, *e.g.*, *Mount Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977). Far from erecting any jurisdictional bar, Congress, in Section 1367(a), has affirmatively authorized the exercise of federal jurisdiction over nonfederal claims that arise from the same nucleus of fact. Indeed, in Section 1441(c), Congress has authorized removal even when the federal and nonfederal claims are unrelated.

Moreover, the judgment below—requiring remand of the entire case rather than only ICS's on-the-record administrative review claims—misconstrues the jurisdictional statutes applicable to this case. The court of appeals held that removal is proper only if the action as a whole falls within federal jurisdiction, and that this requirement applies to both Sections 1441(a) and 1441(c). See Pet. App. 21a-23a. But as we explain in Part I.A above, the phrase "civil action" within "original jurisdiction" under both the federal-question and removal statutes has long been construed to require only that some claims in the action fall within original federal jurisdiction, not that all claims do. The doctrines of pendent and supplemental jurisdiction are based on just this point.

Even Eleventh Amendment jurisprudence recognizes this; the Court has never held that the presence of some claims that are barred by the Eleventh Amendment defeats federal jurisdiction over the entire action. For example, in *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court held that portions of a federal decree that required a state agency to make retroactive payments of public assistance benefits were barred by the Eleventh Amendment, but the Court also held that the district court had jurisdiction to grant purely prospective relief. See *id.* at 667-71. Similarly, in *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam), the Court held that claims against the State and its board of corrections were barred by the Eleventh Amendment and should have been dismissed, but

it did not disturb the balance of the judgment awarding prospective relief against state officials. See *id.* at 782.[25] These decisions preclude the court of appeals' view that if some claims in a complaint are jurisdictionally barred, federal jurisdiction over the entire action is defeated.[26]

D. There Is No Policy Reason To Overcome The Plain Statutory Language And Its History.

Because there is nothing in the jurisdictional statutes to justify an exception from federal jurisdiction for state-law administrative review claims that are reviewed on the record—much less any basis for remanding an entire case in which such a claim is presented—such an exception can only be based on some nonstatutory policy sufficiently powerful to defeat the plain language of the statutes.

To date, this Court has recognized only two blanket exceptions to federal jurisdiction not supported by the text of an applicable jurisdictional statute. These two—domestic relations and probate—exist because the Court has hewed to venerable precedents rendering those types

[25] For just these reasons, the rule announced in *Frances J.* has not received universal support. While one circuit has reached the same result, see *McKay v. Boyd Construction Co.*, 769 F.2d 1084, 1086-87 (5th Cir. 1985), two other circuits have rejected that approach, see *Kruse v. Hawai'i*, 68 F.3d 331, 334-35 (9th Cir. 1995); *Henry v. Metropolitan Sewer District*, 922 F.2d 332, 336-39 (6th Cir. 1990).

[26] Even apart from this error of statutory construction, it is doubtful that *Frances J.* was correctly decided. In that case as in all others in which this question will arise, the State itself removed the case to federal court. Despite the Eleventh Amendment, "the Court consistently has held that a State may consent to suit against it in federal court." *Pennhurst*, 465 U.S. at 99. In particular, when a State chooses to prosecute a claim in federal court, it waives Eleventh Amendment immunity. See *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). It is quite unclear why a State's decision to remove a case against it to federal court should not fall within this rule.

of cases outside federal jurisdiction. See *Ankenbrandt v. Richards*, 504 U.S. 689, 693-94 (1992); *Markham v. Allen*, 326 U.S. 490, 494 (1946). In *Ankenbrandt*, the Court explained that the domestic relations exception was grounded in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859), the Court's "longstanding and well-known construction" of the diversity jurisdiction statute as excluding cases involving the issuance of decrees of divorce, alimony, and child custody, and Congress's acquiescence in that construction. See 504 U.S. at 700-01, 703. As for the probate exception, it comes from an equally old line of cases in which the Court concluded that it had no jurisdiction over cases alleging claims of a purely probate nature, such as probating a will or administering an estate. See *Markham*, 326 U.S. at 494. Both exceptions are construed narrowly. The domestic relations exception bars actions seeking issuance of divorce, alimony, or custody decrees, but permits suits involving related matters (see *Akenbrandt*, 504 U.S. at 701-04); the probate exception bars only actions involving the administration of an estate, but permits claims to be made "in favor of creditors, legatees and heirs" against an estate as long as there is no interference with probate proceedings (see *Markham*, 326 U.S. at 493-95).[27]

There surely is no similar rule that prohibits the extension of federal jurisdiction to cases challenging the decisions of state administrative agencies. In *New Orleans Public Service, Inc. v. Council of City of New Orleans*,

[27] And even these exceptions are applied not to federal question jurisdiction, but to diversity jurisdiction. In cases where these exceptions ordinarily might foreclose jurisdiction over state-law claims, the lower federal courts have still heard constitutional claims under federal-question jurisdiction. See, *e.g.*, *Agg v. Flanagan*, 855 F.2d 336, 339 (6th Cir. 1988) (court had jurisdiction to hear civil rights claims challenging State's method of determining and enforcing child custody payments); *Franks v. Smith*, 717 F.2d 183, 185-86 (5th Cir. 1983) (court could decide Fourth Amendment claim arising in child custody context).

491 U.S. 350 (1989) ("*NOPSI*"), the Court took pains to point out that federal jurisdiction existed over an action challenging a ratemaking decision of the council, since the pertinent jurisdictional statutes contained no exception to federal jurisdiction for such cases. See *id.* at 358-59, 372-73. Indeed, we explain in Part II.B above that this Court has repeatedly upheld the exercise of federal jurisdiction in cases in which the decisions of state agencies were challenged on state-law grounds.

The only conceivable basis for a nonstatutory exception to federal jurisdiction over a case seeking review on-the-record of a decision of a state or local agency is some federalism-based policy that endeavors to avoid entangling the federal courts in sensitive issues of state law. But this Court has never recognized such an exception to federal jurisdiction. In fact, in *Schmidt v. Oakland Unified School District*, 457 U.S. 594 (1982) (per curiam), the Court held that it was an "abuse of discretion" to refuse to exercise pendent jurisdiction over a state-law challenge to a contract-bidding program based on the court's perception that the state-law question was "sensitive." *Id.* at 594-95.

To be sure, there are circumstances where the federal courts should abstain from exercising jurisdiction over a state-law issue presented to them. But the Court's abstention jurisprudence in fact demonstrates the impropriety of the administrative law exception to federal jurisdiction recognized by the court of appeals here. In its cases considering when federal courts should refrain from hearing cases involving state-law questions, the Court has never recognized an exception to federal jurisdiction, but instead permitted abstention from the exercise of jurisdiction under certain demanding tests.

Burford v. Sun Oil Co., 319 U.S. 315 (1943), for example, involved a challenge to an award by the Texas Railroad Commission of a permit to drill oil wells. See *id.* at 317. The Court assumed that it had federal jurisdiction over the action (and did not even discuss whether the case would entail deferential or de novo review of the agency decision). See *id.* at 317-18. The question framed by the Court was not whether federal jurisdiction existed, but whether, assuming federal jurisdiction did exist, the federal court should exercise that jurisdiction where doing so would interfere with a complex, specially designed state regulatory system. See *id.* at 318-32.

As *Burford* abstention has evolved, it has permitted "a federal court to dismiss a case only if it presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar,' or if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Quackenbush v. Allstate Insurance Co.*, 116 S. Ct. 1712, 1726 (1996) (quoting *NOPSI*, 491 U.S. at 361, in turn quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)). Even then, as the Court reiterated in *Quackenbush*, its most recent *Burford* abstention decision, the *Burford* doctrine does not deprive the district courts of jurisdiction. See *id.* at 1720-21. See also *id.* at 1728 (Scalia, J., concurring) (the Court is not "empowered to decide for itself when congressionally decreed jurisdiction constitutes a 'serious affront [to federalism]' and when it does not").

The other type of abstention applicable when a federal court is asked to decide a question of state law makes even clearer the impropriety of the jurisdictional exception created by the court of appeals. In *Railway Commision v. Pullman Co.*, 312 U.S. 496 (1941), the Court held that a federal court should stay proceedings when a case presents a federal constututional challenge to a state enactment that might become unnecessary to decide should a state tribunal construe it in the plantiff's favor. See *id.* at 499-502. *Pullman* abstention is accordingly

proper only when the state or local enactment is fairly susceptible to a limiting construction that would eliminate the federal constitutional claim. See, *e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 468 (1987); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236-37 & n.4 (1984). But even when *Pullman* abstention is appropriate, the federal court may still exercise its jurisdiction since a plaintiff who withholds his federal claims during state-court procedings is entitled to return with them to federal court should he need to do so. See *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 417-18 (1964).[28]

Thus, even when quite sensitive issues of state law are present, the *Burford* and *Pullman* abstention cases make clear that there is no exception to the existence of federal jurisdiction, but only a rule against its exercise in carefully circumscribed circumstances. And the sensitive elements justifying either type of abstention simply will not be present in many—if not most—state administrative review claims that are reviewed on the record. As we explain above, because Illinois law provides for de novo review of questions of law—including constitutional issues—deferential review is limited to questions of fact. See, *e.g.*, *Branson v. Department of Revenue*, 168 Ill. 2d 247, 254, 659 N.E.2d 961, 965 (1995); *Stratton*, 133 Ill. 2d at 429-300, 551 N.E.2d at 646-47. Such factual issues will rarely present circumstances that would lead a court to conclude that the issue was too sensitive for decision by a federal court.

---

[28] In a related abstention doctrine, the Court has announced that abstention may be appropriate in eminent domain proceedings that involve sensitive city-state relationships or an uninterpreted state statute of questionable constitutionality. See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959). But this doctrine, like *Pullman* abstention, merely provides for staying the exercise of federal jurisdiction until uncertain state-law issues are resolved in state court; there is no abdication of jurisdiction. See *Quackenbush*, 116 S. Ct. at 1722-23.

In short, nothing inherent in the removal of state administrative review claims to federal court provides any basis for creating a new exclusion from federal jurisdiction for all such claims that are reviewed deferentially. Federalism concerns may sometimes justify a federal court's abstention, but they surely do not justify the holding below.

Indeed, viewed through the lens of federalism, the exception to federal jurisdiction recognized by the court of appeals is especially unjustified. Excluding state and local government defendants from federal court whenever the plaintiff asserts a state-law claim that is reviewed on the record would be anomalous, at best. A federal plaintiff willing to forgo its deferential claims would still be welcome in federal court. This option—not available to defendants—means a plaintiff such as ICS wishing a federal forum to litigate the federal questions that arise from an administrative review decision could obtain it by filing a civil rights action within federal-question jurisdiction containing only de novo attacks on an agency's decision. It is surely a strange brand of federalism that would limit only the ability of state and local agencies to obtain a federal forum when that is where they choose to defend their administrative actions, while providing those who wish to undermine those decisions with greater ability to select a federal forum. And it is even a stranger brand of federalism that permits federal courts to review the decisions of state and local agencies de novo—as in *Horton*—but prohibits federal courts from giving those decisions the deference that principles of federalism would seem to support.

The decision below also gives rise to anomalous results for plaintiffs who wish a federal forum. Because the court of appeals has concluded that a district court may not hear on-the-record review claims, plaintiffs can preserve their right to a federal forum only by initiating parallel federal and state litigation, in which only their

de novo claims can be adjudicated in the federal proceeding. Surely this Court should not encourage such wasteful duplication. Moreover, in diversity cases, when the agency seeks on-the-record review in state court, nonresident defendants will lose the right to remove and will be left to the mercy of the state court system in situations where Congress has granted them a right to remove as protection against local prejudices. See 28 U.S.C. § 1441 (b).[29]

But the most glaring problem with a rule that the presence of state-law, on-the-record, administrative review claims in a complaint that pleads a federal question defeats removal is that it denies the defendant its statutory right to remove to a federal forum on grounds not specified in any jurisdictional statute. Even worse, it defeats removal of the federal as well as the state-law claims, although there is no policy reason to refuse federal jurisdiction over federal claims merely because they are joined with state-law claims. No decision of this Court suggests that the right to removal can be defeated merely because applicable state law does not provide for de novo review. Nor has any decision of this Court or any statute ever suggested that the district courts are not competent to provide on-the-record and deferential review of agency decisions—indeed *Califano v. Sanders* is squarely inconsistent with any such suggestion.

"Congress [has] [n]ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976). That is because "Congress, and not the judiciary, defines

[29] In fact, the two decisions on which the court of appeals primarily relied here were diversity cases in which the right of an out-of-state defendant to remove was defeated by this administrative review exception. See Pet. App. 11a-13a.

the scope of federal jurisdiction within the constitutionally permissible bounds." *NOPSI*, 491 U.S. at 359. As this Court has explained:

> When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved, which, by law, brings the case within the jurisdiction of a Federal Court.

Wilcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) (citation omitted). Here, the City removed these actions because ICS's claims fell within the original and supplemental jurisdiction of the district court. The court below failed to exercise its jurisdiction and instead remanded both the federal and state-law claims. That decision was incorrect and should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PATRICIA T. BERGESON
Acting Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
ANNE BERLEMAN KEARNEY
Assistant Corporation Counsel
City Hall, Room 610
Chicago, Illinois 60602
(312) 744-5337
Attorneys for Petitioners

June 12, 1997

* Counsel of Record